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Chevron 401(k) case dismissed

A potential harbinger for other pending suits?

AUG 31, 2016 | BY NICK THORNTON



The decision by Judge Phyllis Hamilton comes six months after plan participants filed a claim alleging Chevron fiduciaries mismanaged its plan. (Photo: Getty)

In a setback for the plaintiff's bar, a claim against fiduciaries of Chevron Corp.'s 401(k) plan brought under the Employee Retirement Income Security Act has been dismissed in U.S. District Court for the Northern District of California.

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The decision by Judge Phyllis Hamilton comes six months after plan participants filed a claim alleging Chevron fiduciaries mismanaged its plan, resulting in the loss of tens of millions in retirement savings.

Plaintiffs alleged Chevron failed its duties of prudence and loyalty under ERISA, leveling several claims against company fiduciaries that are similar to those in lawsuits pending against other companies' plans.

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The plan's use of a low-yielding money market fund, instead of a stable value fund, resulted in tens of millions in losses, constituting a breach of ERISA's loyalty and prudence standards, as did the use of retail-share classes of mutual funds, the asset-based recordkeeping fees paid to Vanguard, the retention of an allegedly expensive, low-performing small cap fund option, and an alleged failure to monitor plan fiduciaries by Chevron.

But the evidence provided by plaintiffs' attorneys was insufficient to support all five of those allegations, concluded Judge Hamilton, citing prominent ERISA case law throughout her decision.

Regarding the first four claims, the plaintiffs argued breaches of both loyalty and prudence.

ERISA's loyalty requirement prohibits plan sponsors from self-dealing, or using plan assets to sponsors' financial benefit. In dismissing the claim against Chevron, the court found "no facts" to support allegations that plan fiduciaries used the plan design to benefit themselves or any third party at the expense of participants.

On the question of ERISA's prudence standard, the court also dismissed each of the plaintiffs' claims, again citing a failure to provide sufficient evidence.

On the issue of the Vanguard money market fund offered to participants, which the plaintiffs claimed should have been replaced by a higher yielding stable value fund, Chevron argued that noting in ERISA requires the selection of a stable value fund over a money market fund as a capital preservation investment option.

The plaintiffs' attorneys ceded that point, but nonetheless argued plan fiduciaries failed to consider a stable value fund option. In dismissing that claim, Judge Hamilton ruled plaintiffs' attorneys offered no evidence to support the allegation. Furthermore, the claim that the money market fund underperformed stable value funds is a "hindsight-based challenge" to fiduciaries' decision-making process.

Hamilton quoted language from a 2012 appellate decision in *St. Vincent v. Morgan Stanley Investment Management Co.*, which said fiduciary actions must be judged "based upon information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight."

Excessive fees claim

By the end of 2014, Chevron's plan held more than \$19 billion in assets and had more than 40,000 participants.

Along with the Vanguard money market fund, the investment lineup consisted of 12 Vanguard mutual funds, a Vanguard collective trust target-date series, three non-Vanguard mutual funds, a fixed-income separate account, a collective trust and a Chevron common stock fund.

Some of the funds were offered in retail-class shares when the same investments were available in cheaper institutional shares, alleged the plaintiffs' complaint.

And while most of the lineup consisted of low-cost Vanguard funds, the plaintiffs argued the lineup's entirety should have only included Vanguard investments.

Also, fiduciaries offered mutual funds when, given the plan's size and bargaining power, they should have offered collective trusts or separate account investment structures, which would have lowered the plan's cost to participants, alleged the plaintiffs.

But the court found insufficient facts to support those claims. The claim that fiduciaries failed their obligations under ERISA by not offering the cheapest share classes assumes "that the mere inclusion of a fund with an expense ratio that is higher than the lowest share class violates the duty of prudence," wrote

Between February 2010 and March 31, 2012, Chevron compensated Vanguard, the plan's record keeper, through an asset-based revenue-sharing agreement. The plan negotiated a per-participant flat fee after April 2012.

The plaintiffs alleged the asset-based revenue-sharing agreement resulted in inflated payments to Vanguard and excessive costs to plan participants.

But the plaintiffs failed to show exactly how much participants were paying in recordkeeping fees under the former revenue-sharing agreement, noted Judge Hamilton in her decision.

The assertion that all revenue-sharing agreements result in excessive and unreasonable costs to 401(k) plans is "without support," she wrote, citing case law showing the practice is common and frequently benefits plan participants.

Chevron 'attentively' monitored small cap fund

Between February 2010 and April 1, 2014, the plan offered the Artisan Small Cap Value Fund as an investment option. The plaintiffs alleged that investment carried unreasonably high fees, and significantly underperformed small cap benchmarks. The failure to remove it before they did constituted imprudent management of the lineup by plan fiduciaries, alleged the plaintiffs.

The court found that not only was there insufficient evidence to support the claim that fiduciaries should have removed the fund earlier, but rather the fact that fiduciaries ultimately did remove the fund implied "fiduciaries were attentively monitoring the fund," Hamilton wrote.

Moreover, the fund was removed when it was outperforming its benchmark on a long-term basis, noted Hamilton.

Claim of failure to monitor fiduciaries fails

Plaintiffs also said Chevron failed its duties to monitor fiduciaries to whom

But Hamilton dismissed that claim on the grounds that plaintiffs did not name which fiduciaries failed their duty to monitor, or even if any responsibilities were delegated to other Chevron fiduciaries.

The plaintiffs have until September 30, 2016 to amend their claim.

Jerome Schlichter of St. Louis-based Schlichter, Bogard and Denton was named as the lead attorney for the plaintiffs in the case. He was unavailable for comment for this story.

Brain Boyle, a partner at O'Melveny Myers LLP, was named as the one of the lead attorneys for Chevron. Requests for comment were not returned by press time.

A representative from Chevron said the company would not be commenting on the case.